BIG BOX BACKLASH:

THE STEALTH CAMPAIGN AT THE WORLD TRADE ORGANIZATION TO PREEMPT LOCAL CONTROL OVER LAND USE

A Briefing Paper by Public Citizen's Global Trade Watch

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"[WTO signatory] Countries also should be encouraged to remove any size limitations on individual stores, numeric limits on the number of stores in country and geographic limitations on store locations in the country."

Wal-Mart letter to the Office of the U.S. Trade Representative
May 1, 2002

INTRODUCTION: WAL-MART MEETS GATSILLA

Since it was established in 1962, the retailing giant Wal-Mart has grown to be the world's largest company and the United States' largest private employer with 1.2 million employees and annual sales of $286 billion[1] – a number that dwarfs the annual incomes of many small nations.

Wal-Mart has achieved its astonishing growth by slashing prices to the bone, a strategy with both domestic and global impacts. In the United States, numerous studies and investigative reports have documented Wal-Mart's negative effect on local communities, including poverty-level wages, union shut-outs, shifting of its employees' health care costs onto taxpayers and the erosion of downtown business corridors due to the closing of small- and medium-sized retailers unable to compete with Wal-Mart prices. Wal-Mart's labor rights record has also been poor, with over 40 "wage-and-hour" cases against the corporation currently seeking class action status in 19 states,[2] 60 National Labor Relations Board complaints for retaliating against employees with illegal firings threats while they were attempting to organize workers into unions,[3] and $11 million paid by Wal-Mart to settle a federal investigation into the failure of the corporation's cleaning subcontractors to meet U.S. immigration laws.[4] The firm has also paid out over $20 million in cases involving discrimination against the disabled and has been fined by the Department of Labor for violating child labor laws in three states.[5]

Overseas, the company utilizes a network of 10,000 suppliers that span the globe.[6] The burgeoning number of Wal-Mart sweatshop suppliers around the world was first spotlighted by the 1996 allegations that the Wal-Mart/Kathy Lee Gifford line of clothing was being made by young teenage girls in Central America.[7] The attendant bad publicity forced Wal-Mart to implement a "Code of Conduct" for overseas suppliers. Recently the Wal-Mart employee in charge of implementing the code in Latin America accused the firm of firing him for being too aggressive about monitoring workplaces and finding violations, such as mandatory 24-hour shifts.[8]

> "…zoning and store size restrictions, and hours and hours of operations restrictions, although frequently imposed on a national basis, make investment unattractive in some markets. European hours of operation regulations are particularly troublesome."
>
> *International Mass Retail Association, May 1, 2002.*

Because of Wal-Mart's unique track record of labor rights violations against its U.S. workers, the use of sweatshops in its supply chains, and for its contribution to suburban sprawl, anti-sweatshop groups, economic justice activists, and smart-growth land-use organizations[9] have logically focused a great deal of attention on the corporation. Thus, from small towns in Maine to Mississippi and from Los Angeles to New York, local officials are taking measures to protect their communities, their environment, their wage base and their tax dollars from the Wal-Martization of America. One effective tool has been to place land-use limits on "big box" retailers and other development projects deemed by local officials to be destructive to the community or the environment or simply out of step with local needs and planning objectives.

Some of the policy tools used by communities include:

- Size and height restrictions on big box stores
- Limits on hours of operation
- Economic impact statements before stores can be approved

- Limits on development to protect the environment or protect historic and cultural sites
- Restrictions on the number or design of formula stores and restaurants

Now, some of these mega-retailers are seeking to make an end run around these democratically achieved policies with a sneak attack on communities' ability to govern land use in the public interest. Their new strategy is to team up with a powerful new ally to undermine and preempt local governments. That new ally is a little-known international trade agreement called the General Agreement on Trade in Services (GATS).

The GATS is part of a package of agreements administered by the World Trade Organization (WTO), the Geneva-based international commerce agency with 149 signatory countries. By originally signing on to the WTO in 1994, national governments also agreed to ensure that all levels of government conformed to the GATS' rules.[10] In the United States, there was no specific congressional vote on GATS. When Congress approved the Uruguay Round Agreements Act in 1994 establishing the WTO, approval of GATS was included. Even though there was next to no consultation with state or local governments about the implications of the GATS for state and local regulatory authority, thanks to passage by Congress of the Uruguay Round Implementation Act, the GATS is now federal law with obligations and requirements that apply to authorities at all levels of government. The GATS contains an array of rules which dramatically limit government authority to regulate service sectors covered by the rules. The United States agreed to submit hotel, restaurant, and retail and wholesale distribution to these rules, which means the operation of retail stores like Wal-Mart as well as restaurant and hotel chains. New GATS negotiations are currently underway to expand the number of service sectors that must comply with the terms of the agreement and also to expand the scope of the rules themselves.

As communities across the United States, in Europe and elsewhere are increasingly successful in their effort to limit big box store expansion and destructive retail practices through transparent and accountable measures at the local level, mega-retailers have pursued rules at the WTO which threaten to preempt – or at the very least threaten to chill – such local government policies.

This is possible because under the terms of the WTO agreements, a foreign government can challenge any U.S. federal, state or local policy using the WTO's powerful dispute resolution system, which operates outside of the U.S. court system. If the United States loses such a WTO challenge, the U.S. federal government is obliged either to change the challenged domestic law or face automatic trade sanctions that could amount to millions in penalties. If it is a state or local policy that is challenged, the federal government must take all constitutionally available steps to ensure state or local compliance. Such actions could include enacting preemptive legislation, suing state or local governments, or withholding federal funding until the state changes or eliminates WTO-nonconforming laws.

Wal-Mart has operations in 14 countries and has become the largest retail operation in a number of them. According to Hoover's business report, Wal-Mex is a publicly traded Mexican firm and is the "*numero uno*" retailer in Mexico with over 700 stores and restaurants.[11] It is not beyond the realm of possibility that this powerful economic force could convince the government of Mexico to launch a WTO suit against a type of land-use law in the United States that restricts its plans for unfettered development. Wal-Mart, which has subsidiaries in Europe, could also convince the United States to target European policies which strictly regulate the citing of stores. Any successful WTO suit on zoning or land use, by any party, is sure to have a chilling effect on this type of policy around the globe.

Whether or not there is a WTO suit on land use, however, what has already been achieved at the WTO is significant. GATS rules applied to zoning and land use are nothing less than global rules serving to preempt local sovereignty over land use. These rules would apply equally to the United States as well as to the other WTO nations who have also neglected to safeguard local sovereignty under the GATS. While at the moment there is a limited number of foreign retail, hotel and restaurant service operations in the United States, the numbers are increasing. From Dutch-owned chain stores like Stop & Shop and Giant to the Swedish big box furniture store IKEA, to Germany's ALDI grocery chain, to food chain stores owned by foreign firms, an increasing number of foreign service-sector companies means an increasing chance of a WTO challenge in the United States in the important area of land use and zoning.

While retail operations have been active in petitioning the WTO for policies that would handcuff local land-use policies on a global basis, their activities have gone largely unreported by the media and unrecognized by zoning officials, environmentalists, academics or other land-use experts. This briefing paper takes a first step to alert concerned policy-makers at both the local and federal level. Much more work will be needed to ensure that the WTO GATS is not used to derail local efforts to ensure vibrant local economies, a clean environment and sound historical preservation or design policies.

This briefing paper documents the requirements of the current GATS and the challenges the GATS' powerful "market access" rules pose to numerous U.S. land-use policies. The briefing paper also describes GATS negotiations currently underway at the WTO which would place new constraints on U.S. land-use policies. It also reviews pertinent past WTO cases which have implications on governments' right to regulate. Finally the briefing paper makes a series of recommendations for policy-makers who are interested in safeguarding land-use policies – as well as more broadly safeguarding state sovereignty and local control – from WTO rules.

BACKGROUND: THE WTO GATS AND U.S. LAND-USE LAW

The WTO's General Agreement on Trade in Services has always been extremely controversial because it represents a dramatic shift in the scope of international "trade" rules away from true trade matters – issues such as tariffs and quotas – to a much more expansive notion of establishing uniform global commercial regulations extending far beyond trade which place constraints on broad swaths of domestic policy-making.

While most people envision "trade" to be about trade *between countries* in *goods*, such as computers, corn and coffeemakers, the GATS applies to "trade" in *services*. The GATS encompasses a broad array of service sector activities including financial services, telecommunications services, postal services, retail services, education, energy and more. The GATS also defines "trade" in an extraordinarily broad way – not only including cross-border trade in services (such as services provided via the Internet, satellite and mail), but also the "commercial presence" of a foreign corporation, also known as the right of establishment, which gives corporate entities the right to set up shop *within* the territory of any WTO member in order to provide services there. Just one implication of this broad definition is that an investment by a foreign developer in a big box store, local shopping center or chain store qualifies as an activity that is covered by GATS – meaning foreign investors have certain rights and local governments are supposed to constrain their regulatory authority accordingly. Any policy that actually or even potentially affects the profitability of a service operation with foreign investors can be considered a "barrier to trade" in the WTO because it could violate GATS rules.

Indeed, a former WTO Secretary General Renato Ruggiero once candidly admitted: "The right of establishment and the obligation to treat foreign services suppliers fairly and objectively in all relevant areas of domestic regulation extend the reach of the [GATS] into areas never before recognized as trade policy."[12]

How is land use covered under the GATS? Because the very notion of placing services (including some public services) under the rubric of a "free trade agreement" was so controversial, the most forceful provisions of the GATS only cover service sectors that countries specifically list as covered by the terms of the agreement in a document called their "schedule" of service commitments. Among other sectors, in 1994 the United States committed financial services, health care (via insurance services), recreational services, telecommunications, libraries, retail and wholesale distribution, construction services, Internet services and radio, TV, and other broadcast services.[13] The new GATS negotiations now underway are aimed at expanding the number of each WTO signatory country's service sectors that is covered – as well as the scope of rules with which covered sectors must comply.

Analyzing the problems posed by the GATS for the service sectors explicitly listed on the U.S. list of schedule is difficult enough. Analyzing the potential threats to regulation in sectors *not* explicitly on the list is even more difficult. For instance, although the word "gambling" does not appears in the U.S. schedule of commitments, a WTO trade tribunal ruled in April 2005 that by committing "recreational services" to coverage under the GATS, the United States had committed gambling services to the constraints imposed by the GATS. Gambling is one of the subcategories under recreational services in the WTO and United Nations (UN) services classification systems utilized by most WTO members – *but notably not by the United States* – to give GATS negotiations a common services "dictionary" for the services negotiations. This WTO gambling ruling has significant lessons for regulators at all levels of government which are reviewed later in this document.

GATS is touted as a highly "flexible" agreement because in addition to negotiators being able to choose which service sectors to sign up to the rules, they also have the option of explicitly exempting or "carving out" certain types of services within those sectors from different aspects of the GATS rules. Thus, for example, the United States is proposing to carve out *public* sewage services from its GATS commitments on waste water services. Countries can also preserve certain laws or policies that conflict with the agreement by specifically listing them as exempt from the agreement. For example, U.S. negotiators listed National Endowment for the Arts (NEA) grants as exempt from U.S. GATS media sector commitments. NEA arts grants are targeted specifically to U.S. artists and therefore are "discriminatory" in the eyes of the WTO and would violate GATS commitments without such a carve-out.

> "(H)is delegation was holding internal consultations about the retail distribution sector and had noted that some schedules of other Members contained restrictions under Article XVI [Market Access] on municipal regulations on the locations or numbers of shopping centers in urban areas. Other schedules of commitments did not make any such reference. Both the delegations who had scheduled limitations and those who had not, thought that they were free to impose such restrictions. There was a need to clarify this grey area."
>
> *Chilean trade negotiator, February 27, 2003*

But U.S. land-use laws on the other hand *are* covered under the GATS and thus must comply with GATS rules because the United States *failed* to carve out or exempt local zoning and land-use laws when it made broad GATS commitments under wholesale and retail distribution as well as hotel and restaurant services.

In contrast, many other countries sought to exclude local land-use decisions from GATS coverage by specifically exempting local or national policies – such as economic needs tests for retail operations and restrictions on development in historic areas – that might affect retail, restaurant and hotel services. Countries that took such carve-outs include France, Italy, Korea, and others listed in Appendix 1.

Thus, because of the U.S. failure to take such safeguards, U.S. land-use policies at the state and local level are not only challengeable at the WTO, but state and local governments are obliged to conform their land-use policies to the GATS' strictures. The few news reports that have been published regarding big box industry lobbying on this topic at the WTO reveal what types of local land-use laws are at risk.

BIG BOX STORES TARGET LOCAL LAND-USE LAWS AS "BARRIERS TO TRADE" IN THE WTO GATS

Under GATS rules all government "measures" – including those of local government and local authorities such as county and municipal planning boards – that affect trade in services in a covered service sector must conform to GATS constraints, or such domestic policies are subject to WTO challenge. In GATS lingo a "measure" means a law, regulation, rule, procedure, decision, administrative action, guideline, unwritten practice, or can take "any other form…"[14] This sweeping definition covers not only most land-use policies enacted by local governments, but any discretionary decisions made by local officials, including planning boards. The WTO's training materials on the GATS explain that the agreement has an "extremely wide scope of application," encompassing any measure that even "incidentally" affects trade in services.[15]

Major big box retail corporations have been eyeing the GATS as a way of overturning local zoning and land-use laws that have kept them out of communities in Europe and the United States. Wal-Mart, in a May 1, 2002 submission to the United States Trade Representative (USTR), asked that Bush administration trade negotiators press countries to remove "any size limitations on individual stores" and "geographic limitations on store locations" in WTO signatory countries.[16]

Similarly, a submission by the International Mass Retail Association (now called the Retail Industry Leaders Association, whose members include Wal-Mart, Target, and Home Depot)[17] argued that "zoning and store size restrictions, and hours of operation restrictions, although frequently imposed on a national basis, make investment unattractive in some markets. European hours of operation regulations are particularly troublesome."[18]

The president of the European Foreign Trade Association has identified "easy approval" of building permits as a goal it is demanding for retail interests in the GATS negotiations.[19] At a Sept. 12, 2002 conference on the GATS organized by the U.S. Department of Commerce, a retail industry representative identified IKEA (the Swedish furniture retailers) and Royal Ahold (the Netherlands-based owners of the Stop & Shop and Giant Food chains in the United States) as among the globalized companies facing problems with local land-use policies. The representative identified regulations related to the "size and location of stores" as a specific trade barrier.[20]

Most recently, the U.S. National Retail Federation (NRF) led a delegation to lobby the WTO that included representatives from Wal-Mart and the Gap, Inc. The purpose of this trip, according to an NRF press release, was to highlight limitations on "retailers' ability to open stores overseas."[21] While the NRF press release implied that the focus of the visit would be on zoning barriers outside of the United States, it also noted that NRF's European sister group would be on hand.[22] This lobbying voyage shows the way in

which retail companies partner internationally to eliminate barriers to their business both inside and outside the United States.

Why are these firms so focused on the GATS? Because the GATS contains powerful rules ("national treatment" and "market access") that restrict the conditions governments can place on service suppliers, such as land-use laws designed to protect neighborhoods, and as a result facilitate the entry of foreign firms into covered service sectors.

Below we describe precisely how these GATS rules, which are enforced by the WTO's powerful dispute resolutions system, can be used to undermine local land-use law.

GATS' RULES LIMIT THE TYPE OF LAND-USE POLICIES LOCALITIES CAN PURSUE

Among the GATS' rules is a grant to foreign service-providers of what is known as the "right of establishment" – that is the right to enter another country's service market and set up a company. The GATS text includes a series of rules that place constraints on the regulatory authority of domestic policy-makers at the federal, state and local level while simultaneously creating new rights for foreign service-companies to provide services within another country in a GATS-covered service sector.

"National Treatment"

For instance, the GATS "national treatment" rules (GATS Article XVII) prohibits all levels of government from actions or policies that modify the "conditions of competition" in favor of local service-suppliers. GATS proponents often claim that the treaty does nothing more than simply ensure nondiscriminatory treatment of domestic service-providers and foreign providers. In fact, under this GATS rule, *nondiscriminatory* regulations – meaning rules that apply even-handedly to both foreign and local companies – could still be considered a national treatment violation. For instance, a Background Note prepared by the WTO Secretariat states that regarding the construction sector, even if the *same* controls on land use, building regulations and building permits are applied to domestic and foreign service–suppliers, "they may be found to be more onerous to foreign suppliers."[23] Thus, if a non-discriminatory permitting process or easement-granting process (such as road access) results in some domestic companies obtaining such permissions but another group of companies including a foreign company not obtaining such permissions – all based on the merits of the applications not the companies nationalities – this differing effect could be considered a GATS violation for altering the conditions of competition for a foreign firm. Similarly, a non-discriminatory policy such as an environmentally friendly building code requiring the extensive use of recycled materials and energy efficient construction might be challenged under the same GATS rules if in effect – even not in intent – it might prove more difficult for a foreign service-provider to fulfill the domestic policy relative to a local firm.

"Market Access"

The GATS "market access" rules (GATS Article XVI) prohibit federal, state and local governments from creating or maintaining policies in a covered service sector that place:

- limits on the number of service suppliers, including through quotas, monopolies, economic needs tests, or exclusive service supplier contracts (absolute bans on certain activities such as the U.S. ban on Internet gambling have been interpreted as "zero quotas" by WTO trade tribunals)
- limits on the total value of service transactions or assets, including by quotas or economic needs tests
- limits on the total number of service operations or the total quantity of a service
- limits on the total number of natural persons that may be employed in a particular service sector or by a service supplier
- policies which restrict or require specific types of legal entity or joint venture through which a service supplier may provide a service
- limits on foreign ownership expressed as a maximum percentage or total value.[24]

There is nothing quite like GATS Article XVI in any other international commercial agreement. These market access rules are framed in absolute, rather than relative, terms meaning they simply ban certain types of public policies and practices whether they are discriminatory or not. If the United States wishes to maintain any policy at the federal, state or local level that is in contradiction to these rules, it must be specifically exempted or carved out of the agreement in the U.S. GATS list of service commitments. If such an exemption is not taken, a policy contradicting these rules is presumptively a violation of the agreement and thus is exposed to challenge in a WTO trade tribunal where local governments have no standing and citizens are not welcome.

What does this mean practically? **Once a service sector is offered to be fully covered under GATS rules, countries are forbidden from limiting the number of service providers in that sector.** Many local land-use laws set limits on the number of hotels, restaurants and retail operations to minimize the impact of development on the environment and protect open space. When hotel services are bound under GATS (as they are in the case of the United States), a state or community that halts beach-front development for environmental purposes and inadvertently stops a foreign hotel from operating, could find their local law challenged as a WTO violation, even though the policy applies equally to domestic firms as well as foreign firms. In addition, economic needs tests (which are not defined in the GATS, but usually involve some type of analysis to determine if a market is already saturated with a certain type of service before new outlets are opened) are prohibited. Under the GATS, a government's maintenance of any of these policies in a service sector covered by GATS would be subject to a WTO challenge. Worse, the mere threat of challenge by well-financed big retailers with influence over governments could preemptively chill establishment of any such policies.

Remarkably, under GATS rules, once market access is granted, it cannot be reversed unless compensation is offered to nations for their lost business opportunities (current and future). GATS Article XXI.4 requires that a country "may not modify or withdraw its commitment until it has made compensatory adjustments." This requirement is geared towards "locking in" the level of liberalization or deregulation that a nation commits to under the agreement. Thus, if the United States were convinced by local governments to "take back" its GATS commitments to protect local control over land use and thus establish the same safeguards other countries have already put in place, other WTO countries could demand that the United States first "pay" them, by offering up new service sectors for market access and deregulation. Failure to compensate would open a country to a WTO challenge. Then a WTO tribunal effectively could simply order the compensation in the form of trade sanctions against the country that changed policies without advance permission by the other WTO countries.

Before GATS became so controversial, the WTO had on its website a revealing online guide to what the GATS rules mean in practice. "[B]ecause unbinding is difficult, the commitments are virtually guaranteed conditions for foreign exporters and importers of services and investors in the sector."[25] Nonetheless, for countries that want to un-commit a sector, compensation remains the flawed and only option. Currently the European Union is in such GATS compensation negotiations over changes it seeks to make in the GATS schedules of the ten countries that became part of the European Communities in 2004. Clearly, a better solution would be to revise GATS rules so that legitimate, nondiscriminatory regulations serving the public interest are not violations of the agreement.

For activists and local officials working on big box store regulations, GATS market access rules threaten many of the following democratic policy measures:

Limits on the height or size of buildings: Any local laws that apply height and size restrictions to big box retailers and that impact a foreign service-operation could constitute a GATS market access violation. These rules could be considered limitations on the value of the service transaction or asset, the total quantity of a service output or the total number of people a service supplier may employ. Many communities place such limits on the size of big box retail superstores in order to limit sprawl, preserve the culture and style of their downtowns, and safeguard small businesses. Also threatened are prohibitions on the size of retail buildings that sell a certain type of good, including limits on the size of Wal-Mart Super Center-style big box stores that sell groceries. These stores can be built in excess of 200,000 square feet. One example of this type of local law is a rule in Hailey, Idaho that limits the roof area of retail and commercial buildings to 25,000 to 36,000 square feet in all of its business districts.[26] While Hailey has been successful in beating back a Home Depot challenge to that zoning law, the city of Dunkirk, Md., which has similar laws, is currently facing a Wal-Mart challenge in domestic court to their zoning regulations. In that locale, Wal-Mart is attempting to evade size restrictions by placing two stores side by side.[27] Under WTO GATS rules, when communities pass such laws and then succeed in protecting them in court, the function of the U.S. democratic process can be second-guessed with WTO challenges.

Economic impact analysis. A number of localities are starting to require economic impact analysis for big box stores and other major development plans, but some of these policies could run afoul of GATS rules. One example is the Los Angeles Superstore Ordinance, which requires retailers wanting to build stores larger than 100,000 square feet in economically depressed areas to pay for an economic impact statement which examines ten factors, including the superstore's impact on grocery stores and other retail operations in the area. [28] Although the economic analysis is geared toward enabling the City Planning Commission to make an informed decision, it could be considered a GATS-prohibited economic needs test if it results in the demise of a planned superstore owned by a foreign investor.

Historical district preservation rules: Rules that require buildings to conform to traditional architectural standards, such as height, size and design limits are jeopardized by GATS market access rules if they affect foreign firms, because they can be construed to limit the total value of the service asset or output. Also threatened are countless local policies like that approved in May 2004 in Bristol, Rhode Island restricting chain businesses to 2,500 square feet and 65 feet of street frontage in the town's historic downtown area.[29]

Bans on building in ecologically sensitive areas or coastlines: Restrictions on development in ecologically sensitive areas such as coastlines, aquifer recharge zones, rivers, wetlands and animal habitats are also threatened by GATS market access rules. WTO panels have interpreted regulatory bans in a covered service sectors to constitute GATS prohibited "zero quotas." Bans on development that impact foreign corporations are likely to be treated skeptically by GATS panels. Such limits were used in

April 2004 by Westfield, Idaho's Lauth Development Company, which sent Wal-Mart a letter informing them that their project permissions were being pulled. Town councilors cited the paving over of 450,000 square feet of "rolling, wooded land" and proximity to sensitive wetlands as considerations in their decision.[30]

Hours of operation rules: Any restrictions on the hours of operation that affect foreign service-providers could be considered a limitation on the total quantity of service output or on the total number of employees that can be hired, both in violation of the GATS. In Des Moines, Iowa, a 24-hour, seven-day a week Wal-Mart Super Store was blocked because of the night time noise, traffic and quality-of-life concerns of nearby residents. The store could have been built if it limited its hours to 8 a.m.-10 p.m. [31]

Limits on formula restaurants and chain stores: Any cap on the number of outlets, such as formula restaurants and chain stores, could be considered a violation of GATS market access rules if foreign firms were involved. An example of this kind of regulation is the 2002 decision by the city of Arcata, Calif., to pass an ordinance which limited the number of formula restaurants to no more than nine at any one time.[32] In addition, residents of San Francisco, Calif. are notified whenever a formula retail business applies to open a branch in their neighborhood, and are entitled to request a public hearing and subject the applicant company to a list of criteria. Formula retailers are also banned entirely from the four-block Hayes Valley business district of San Francisco, and are automatically required to undergo a hearing and review in the Cole Valley neighborhood.[33]

To reiterate, land-use laws that violate GATS rules can be challenged as trade violations by foreign governments in powerful and binding dispute resolution system of the WTO. State and local officials and affected citizens have no right to participate in these proceedings, and hearings are held behind closed doors at the WTO headquarters in Geneva, Switzerland. State and local laws that are successfully challenged must be changed or the nation could face punitive sanctions on its exports. The federal government must use all constitutionally available means to force compliance by local governments including lawsuits, federal preemption, and the withholding of federal funds.

To date, the number of GATS cases brought against governments in the WTO dispute resolution system has been small. However, a recent GATS loss by the United States regarding policies banning Internet gambling reveals the threat to the right to regulate posed by the GATS. Because the gambling case and several other recent WTO GATS cases are demonstrating just how these rules can be used, an increase in GATS-based challenges is expected.

THE GATS GAMBLING CASE: RECENT WTO TRIBUNAL RULING CONFIRMS THREAT TO RIGHT TO REGULATE

The GATS is a relatively new agreement and acknowledged to be full of ambiguities. Because there had been so few WTO tribunal interpretations of GATS rules until recently, many governments relied on the lack of a GATS track record to make optimistic statements about how their regulations would fare if subjected to a GATS challenge. Switzerland's representative has claimed for example, that zoning is protected under the GATS because the agreement was "flexible regarding national policy choices and regulation."[34] However, a recent WTO tribunal decision on the GATS indicates that there is no justification for such optimism.

In June 2003, the tiny Caribbean nation of Antigua filed a WTO GATS case against the United States. Antigua was represented by European and U.S. law firms with strong ties to non-Antiguan gambling

corporations. Antigua's WTO complaint argued that U.S. federal and state anti-Internet gambling regulations violated the United States' GATS obligations under the WTO, and that such U.S. polices had decimated Antigua's burgeoning Internet gaming industry. In November 2004, a WTO panel ruled in favor of Antigua and against the United States on all points. The United States appealed shortly thereafter. Major aspects of the initial ruling were upheld by the WTO Appellate Body in April 2005. The WTO Appellate Body is the final arbiter in WTO disputes, so the Antigua case concluded with this decision.

Key aspects of the decision are relevant to the topic of zoning:

- First, the Appellate Body affirmed the radical lower panel ruling that outright bans on gambling, such as the federal policy banning Internet gambling, constituted a numerical "quota of zero" that violated GATS market access rules prohibiting limitations on the number of service suppliers and impaired the right of Antiguan gambling companies to enter the U.S. Internet gambling "market." This aspect of the ruling, which reaffirmed a similar interpretation of GATS market access rules in a previous case, means that not only are U.S. bans on Internet gambling considered WTO-illegal "zero quotas," but that regulatory bans of pernicious behavior in any covered service sector – even if a ban applies equally to potential domestic and foreign providers – will be considered a forbidden "zero quota" at the WTO. Thus, local zoning policies that flat-out prohibit certain types of development or that simply ban development in certain areas could be construed as a violation of GATS rules.

- Second, the final WTO ruling upheld the initial panel's determination that the United States had inadvertently submitted the entire gaming sector to WTO rules when it agreed to commit a sector called "recreational services" to WTO disciplines – even though the word "gambling" does not appear in the U.S. schedule of commitments.[35] While this case focused on the subcategory of Internet gaming, the ruling that the United States committed gambling services to WTO jurisdiction has significant implications for *all* U.S. federal, state and local gaming policies which are now vulnerable to WTO challenge. State policies likely in violation of GATS market access rules, which prohibit limits on service providers or monopolies in covered services sectors, include: limits on the number of casinos or slot machines; exclusive Indian gaming compacts; and state lottery monopolies. Unless state and local policies are explicitly exempted in writing from the terms of the GATS, they are automatically covered and must conform to GATS rules. As noted, the United States has failed to explicitly exempt local zoning policies from coverage under the GATS.

- Antigua's initial WTO challenge to U.S. gambling law targeted specific U.S. state level gambling legislation or bans in Louisiana, Massachusetts, South Dakota and Utah. While the Appellate Panel ruled that Antigua's lawyers had not properly listed these state and local laws, and therefore that the laws could not be ruled upon, the WTO panel's decision left these state and local laws open to future challenge. To bring a WTO case against a state and local zoning policy, the challenging WTO nation would simply have to file the paperwork correctly in order to not be caught in the same trap.

While the United States ultimately dodged a bullet when the WTO Appellate Body ruled that the special harms of Internet gambling qualified the U.S. ban under the never-before-used "public morals" exception in the agreement, it is highly unlikely that U.S. zoning policies would qualify as measures to protect public morals. Moreover, there is no environmental exception in the GATS which could be used to defend

environmentally sensitive land-use laws. Indeed, because an environmental exception, even if weak, is included in many other trade agreements, its omission in GATS is glaring.

The WTO panel's conclusion that gambling is covered by the United States' GATS commitments – despite the United States' protests that it did not intend to commit gambling to the WTO's service rules – shows that trade commitments can affect a surprising number of economic sectors, even those that governments may have intended to exclude from WTO service commitments. The WTO's chilling conclusion – that bans of gambling constitute a "quota of zero" prohibited by market access commitments – has profound implications for communities' abilities to use land-use tools to restrict construction to protect neighborhoods, the environment and citizens from potentially harmful or simply unwanted development. Finally, the possibility that state and local policy or actions can be jeopardized in international trade tribunals could have a chilling effect on local governments' willingness to pass legislation or make decisions that could be considered a violation of international legal obligations.

EXHIBIT A: UNITED STATES USES GATS TO FORCE JAPAN TO STRIKE DOWN LAW SAFEGUARDING MOM & POP OUTFITS

If all of this talk about a potential WTO suit against land-use policies sounds far fetched, Exhibit A is a past WTO complaint that makes the argument more plausible. While the example illustrates a U.S.-led WTO attack on Japan's retail policy, a decade of U.S. experience at the WTO proves that what's good for the goose is good for the gander, and U.S. policies might be the next to be challenged.

Japan's Large-Scale Retail Law required local governments to conduct extensive public hearings and economic, traffic, environmental and other impact assessments before a large retailer could open for business.[36] The goal of the law was to promote the establishment of and maintain small shops, such as neighborhood-owned and -operated retail shops. By preempting unfair competition by large corporations whose higher "costs" in traffic and environmental damage would otherwise go uncounted in the "bottom line," the law sought to balance the playing field for the small shops. The law's requirements applied equally to domestic and foreign investors and service providers, and established a comprehensive screening process for all retailers over a certain size, regardless of "nationality."

The USTR mounted a two-prong assault on the law. First, in a U.S. WTO case alleging that Japan discriminated against imports of Kodak film, the United States challenged the retail store size law arguing that it created obstacles to imports.[37] The United States contended that since large-scale retailers are more likely to sell imported goods than local shop-keepers, the law served to disrupt trade.[38] The WTO dispute panel ruled that because there was nothing in the Large-Scale Retail Law that prevented small shops from retailing imported goods, the United States had not proven its case.[39]

Second, the United States also had registered a WTO complaint against the "mom-and-pop" store law under the GATS, contending that its procedural requirements – hearings and impact assessments – created a barrier to the market access of foreign retailers and increased the leverage of smaller merchants over larger competitors.[40]

All of the USTR's evidence was anecdotal: it asserted that small companies used the law to limit the operations of larger retailers, that is, to delay opening dates, to restrict their business hours, and through other means.[41] It also claimed that the law enabled small merchants to "extract promises" that the large retailers not compete against them in certain narrowly defined areas.

Consultations between the United States and Japan began in 1996 and continued past the resolution of the Kodak case in 1998. By May 1998, Japan acquiesced to U.S. demands that it abolish its Large-Scale Retail Law, passing legislation that substantially watered down the policy. Its new name is the Large-Scale Retail Store Location Law, and it provides only for environmental and traffic impact assessments for large-scale retail locations.[42] The new policy no longer takes into consideration the economic impact of competition from large retailers on local businesses. The WTO threat resulted in a policy change that sacrifices small business owners so that mega-corporations like Wal-Mart and its Japanese equivalents have an easier time dominating the market.

GROWING URGENCY AS NEW NEGOTIATIONS ARE UNDERWAY TO APPLY NEW WTO RULES TO COMMON LOCAL GOVERNMENT POLICIES

As if the existing GATS provisions that threaten local control over land use were not bad enough, GATS negotiators are currently working on developing new cross cutting "disciplines" on all the domestic regulation of services. These negotiations were triggered by a provision in the original GATS text that instructed negotiators to discuss whether it was necessary to establish cross-cutting disciplines that would apply to countries' domestic regulatory service sector measures in addition to the limits on regulation established in other aspects of the GATS text (GATS Article VI.4). These negotiations started in 2000 and continue today – offering an opportunity for concerned state and local officials to weigh in on the negotiations.

The initial question – are new disciplines necessary at all? – has not been given appropriate consideration. Thus GATS negotiators participating in the WTO's "Working Party on Domestic Regulations" are now close to having draft GATS amendments to propose for adoption that could subject an enormous array of domestic regulations on all services – perhaps including those not committed to GATS – to challenge on the basis that they are "unnecessarily" burdensome or have the effect of restricting trade. At issue with these new disciplines is not whether domestic policies treat foreign service-providers less favorably – as noted above, that is already forbidden under GATS rules – but rather whether nondiscriminatory domestic regulations violate new *subjective* WTO limits on regulation.

The specific domestic regulations that would explicitly be subject to such new limits on regulation are:

- licensing requirements, such as bonding requirements for contractors. The European Union is defining "license" so broadly that even construction and occupancy permits would be affected by the new GATS restrictions.[43]
- technical standards service suppliers have to meet, such as staff ratios in schools and municipal construction codes. The definitions provided by the WTO Secretariat of "technical standards" would seem to leave little out. For example, the WTO Secretariat's definition includes requirements that apply both to the definition of the service and "to the manner in which it is performed."[44] What regulation could not be defined as a requirement about how a service is to be performed?
- qualification requirements for individual service suppliers, such as architects and engineers.

The proposed new WTO limits on such domestic regulations would apply not only to all levels of governments – but also to non-governmental organizations with delegated government authority. Some countries participating in the Working Party on Domestic Regulations additionally proposed that even

voluntary standards should be required to be "no more trade restrictive than necessary."[45] This proposal would subject voluntary building codes adopted by construction associations, such as those to decrease the environmental impacts of development, to possible WTO challenge as being unnecessarily restrictive.

While many industries pushing these new disciplines and some countries involved in these negotiations attempt to portray these negotiations on domestic regulations as dealing with a very narrow group of service sector regulations applying merely to licensing issues, in practice there is hardly any service sector that is untouched by licensing requirements and technical standards.

Leaked negotiating documents obtained by Public Citizen and included in Appendix 2 reveal the level of corporate ambition with regard to using the current GATS negotiations to handcuff governments' regulatory authority. Negotiators drew up a list of regulations to be targeted in the discussion. Among the targets, which look like a retailers' "wish list," are:

- "restrictive regulations relating to zoning and operating hours, to protect small stores"
- "too many licenses required in order to operate a business"
- "a lack of transparency in domestic town planning regulations, that might prejudice decisions on the location of installations to provide such services through commercial presence (distribution services)"
- "applicant must possess indemnity insurance or be bonded prior to licensing"
- "the processing period for a license application is long"
- "a great deal of documents must be submitted throughout several stages in order to obtain authorization"
- "restrictions on fee-setting, and restrictions/prohibitions on marketing and advertising."[46]

One proposed draft of the new disciplines on domestic regulation requires governments at all levels not to "prepare, adopt, or apply" measures that are more "burdensome than necessary." Similarly, another proposal is to review all existing regulations to ensure that they were "the least trade restrictive."[47] These extraordinary tests mean that even if a local government were to regulate zoning in a completely transparent and nondiscriminatory way, its policies could still be open to WTO challenge to determine if they were "necessary" or "no more burdensome than necessary" to meet a particular goal as determined by a panel of three trade officials meeting behind closed doors in Geneva, Switzerland.

Equally alarming, the European Union believes that these new GATS restraints would automatically apply to government procurement contracts: "the disciplines of Article VI:4, once agreed, would apply to government procurement in services."[48] While government purchasing of services is exempt from some GATS rules, it is not exempt from Article VI. So any qualification, licensing requirement, and/or standard a government stipulated in their purchasing contracts could be challenged at the WTO as unnecessarily onerous. It would not matter what the size of contract was, as the Europeans are not suggesting the new restrictions would only apply to contracts above a certain monetary threshold. Under this proposal, the smallest procurement contract issued at the county level could be subject to a GATS challenge.

Land-use laws, license requirements, government procurement and the "necessity" of policies are the subjects of political debate every day in town halls and state houses across the country. What the proposed GATS provisions would do is make closed-door WTO tribunals – not locally elected representatives – the ultimate judges of whether or not a policy is "burdensome" or is justified to exist. Neither local

governments nor the affected communities would have any right to participate in WTO proceedings. WTO tribunal proceedings are closed to the press and the public.

In short, a "necessity test" applied to local land-use planning and other services provided by local governments is sure to expose an even wider array of state and local policies to WTO challenge as overly burdensome "barriers to trade." Unfortunately, negotiators participating in the Working Party on Domestic Regulations report that momentum is building in these talks. The former chair of the services negotiations, Alejandro Jara, believes that "the Working Party on Domestic Regulation should be able to provide some elements for disciplines before Hong Kong."[49] This suggests that WTO trade ministers could be asked to approve key aspects of GATS disciplines on domestic regulation very soon. Yet, there has been no consultation of elected officials or the public on a proposal that would have such far-reaching domestic implications.

GROWING OPPOSITION TO ATTACKS ON LOCAL AUTHORITY BY GATS AND OTHER "FREE TRADE" AGREEMENTS

As the full extent of the threat that the current GATS and the possible new GATS disciplines on domestic regulation could pose to the regulatory authority of local governments has become clearer, governments and government associations have joined public interest and citizens' groups in expressing concern about the GATS or denouncing it entirely. In a September 2002 letter to the USTR, the National League of Cities (NLC) described the proposal for "least burdensome" regulatory requirements in the GATS as alarming, and a departure from the deference shown by U.S. courts to measures that protect the public interest.[50] In general,

> *"NLC opposes the federal government expanding service disciplines in GATS or FTAA [Free Trade Agreement of the Americas] to include coverage of [...] restrictions on access to commercial presence on land; or government service sectors, such as land and resource management [...] At a minimum, the federal government should study the effect of the current restrictions on local government before including more sectors under GATS."*[51]

In 2003, a bipartisan group of 30 state attorneys general representing the National Association of Attorneys General wrote the USTR to express their concerns:

> *"One of the primary bases for our concern is our understanding that the general structure of [the GATS] does more than to simply remove discriminatory treatment. Rather, to the extent that the general framework seeks to promote trade in services by neutralizing regulations, programs, and policies that other nations consider to be inappropriate, burdensome or unnecessary, this can have a serious impact on our ability to defend the public interests that are at the core of those regulations [...] Statutes and regulations that States and local governments have validly adopted, that are plainly constitutional and within their province to adopt, and that reflect locally appropriate responses to the needs of our residents, should not be overridden by federal decisions solely in the interests of increased trade."*[52]

The National Conference of State Legislators (NCSL) has also expressed concerns to the USTR:

> *"NCSL is concerned that negotiations are proceeding under the General Agreement on Trade in Services (GATS) without a full understanding of the impact of GATS on state and local authority*

[...] Great care must be exercised to protect state laws and authority from unjustified challenges that will predictably result from the broad language of trade agreements."[53]

Additionally, state legislatures have begun stepping up their criticism of GATS and other "free trade" agreements that threaten local authority. The Utah Legislature passed a resolution in March 2005 declaring concern for "the impact that GATS rules on domestic regulation may have on [...] the public interest standard for exercising regulatory authority" and resolved "that the Legislature of the state of Utah urges the United States Trade Representative to conduct trade negotiations in a manner that will preserve the responsibility of states to develop their own regulatory structures and that will avoid litigation in world courts."[54]

In February 2005, the Montana State Senate passed a resolution expressing concern over the impact of the GATS on the state's regulatory authority and demanded that "the Montana Legislature and other state legislatures [be] consulted by the United States Trade Representative before commitments are made to specific provisions in trade agreements" and that "legislation implementing any new trade or investment accord include appropriate protections for the states from federal lawsuits enforcing these agreements."[55] One month later, the Indiana State Senate passed a resolution calling for a moratorium on all new trade agreements and a review of all international trade agreements.[56]

Unless municipal and county officials and their national associations increase the pressure on the USTR to obtain local officials' ***prior, informed consent*** before subjecting their regulatory authority to the terms contained in "trade" pacts, federal trade officials will continue to negotiate away state and local authority and impose an international preemption that is extremely difficult to reverse. The upcoming December 2005 WTO Ministerial meeting in Hong Kong, where decisions are expected to be taken regarding new "disciplines" on domestic regulation in the service sector, offers local officials an opportunity to launch their push back – demanding that U.S. federal officials pare back GATS rules and coverage rather than expand the GATS' scope.

SHELTERING LOCAL LAND-USE LAWS FROM THE GATS

When the original GATS commitments were negotiated in the early 1990s, several WTO members, including Italy, France, and Korea specifically exempted their sovereignty over land-use and zoning decisions. (A list of some of these exemptions can be viewed in Appendix 1.) The United States failed to make similar exemptions, and instead made sweeping commitments in several sectors ripe for GATS challenges to local land-use policy, including retail and wholesale distribution and hotel and restaurant services. This was perhaps unintentional on the United States' part, since the U.S. government has disagreed in the past with WTO notions about what certain GATS commitments mean – such as regarding the Antigua gambling case described above.

This confusion over zoning policies specifically was illustrated in 2003 when a Chilean trade negotiator told a GATS meeting that:

"(H)is delegation was holding internal consultations about the retail distribution sector and had noted that some schedules of other Members contained restrictions under Article XVI [Market Access] on municipal regulations on the locations or numbers of shopping centers in urban areas. Other schedules of commitments did not make any such reference. Both the delegations who had scheduled limitations and those who had not, thought that they were free to impose such restrictions. There was a need to clarify this grey area."[57]

Despite this revelation that zoning regulations around the world could be threatened by GATS commitments, GATS negotiators are in fact *not* working to "clarify this grey area," rather they are working to expand the number and coverage of GATS rules that could be used to undermine local land-use policy.

Other debates of equal significance to localities have emerged at the ongoing GATS negotiations – even though local officials have not been informed of them or invited to give their input. For example, one relevant discussion covered the topic of if or how governments could respond to a crisis in the retail sector when the entry of giant retail firms wipes out small operations. Some developing countries are asking for a special provision that would allow for temporary suspension of GATS commitments in order to deal with such crises. The Swiss delegation submitted a paper arguing that a special provision was unnecessary, and that the GATS was flexible enough to allow governments to protect small retailers by implementing special hours of operation and zoning regulations. Yet other delegations stated they thought these regulatory initiatives would violate existing GATS commitments. At an October 2003 meeting on the GATS, Korea's representative asked whether "administrations could actually apply a stricter zoning plan without nullifying market access" – meaning that whether governments' tightening up land-use policies on the books at the time of GATS' establishment might in itself violate GATS rules.[58]

While the number of conflicts resulting from this grey area has expanded greatly in recent WTO discussions, GATS negotiators have not attempted to clarify whether domestic zoning policy is or is not subject to WTO challenge. Thus, a dangerous confusion is likely to remain settled only by a WTO tribunal's random ruling *à la the Antigua gambling case,* unless those concerned about protecting land-use policies from inappropriately expansive "trade" rules are as active in lobbying the member nations of the WTO as Wal-Mart and other retailers have been.

Short of major changes in the GATS agreement so that nondiscriminatory regulations cannot be challenged, the best way for any individual nation to preserve zoning policies is not to offer up any service sector for which there are local zoning implications. If a nation has already made commitments in sectors such as retail distribution, which impact its ability to zone in the public interest, a nation should "take back" these commitments even if it triggers the compensation requirements of GATS Article XXI.4.

This will not happen in the context of U.S. zoning policies unless there is a concerted effort by local governments demand these actions from U.S. federal trade officials in the context of the current round of trade negotiations and the December 2005 Hong Kong Ministerial Meeting.

POLICY RECOMMENDATIONS

On July 31, 2004, trade representatives signed a WTO framework agreement to accelerate negotiations to expand the GATS.[59] A deadline of May 2005 was set for governments to commit more of their countries' service sectors to GATS rules, yet this deadline has slipped and conclusion of the new round of services negotiations is targeted for 2007.[60] In the meantime, important services decisions will be made regarding GATS "disciplines" on domestic regulation at the December 2005 WTO Ministerial Meeting in Hong Kong.

Major retailers have been happy to utilize GATS as a backdoor to achieving their goals of international expansion unconstrained by democratically achieved local land-use and other local development policies. Their efforts to fine-tune the GATS to this end are long underway and constantly intensifying. Unaware

of the threat, countries around the world have failed to protect important land-use and zoning policies from GATS rules. It is notable that Greece, for instance, successfully carved out the Acropolis and other historic sites from its GATS hotel and restaurant obligations, but failed to protect the historic district from its GATS retail distribution obligations. It is unlikely that Greek officials are issuing an invitation to Sam Walton to put a Wal-Mart sign on the Parthenon. Rather, this was most likely an oversight on the part of Greek negotiators that will unfortunately not change unless action is taken within the negotiations to change the rules to foreclose such options. However, the example does illustrate the policy confusion, even among those touted to be GATS experts, that is likely to lead to WTO suits against legitimate zoning and land-use policies.

In the short term, concerned officials can contact Bush administration trade officials to demand that state and local sovereignty and the principles of federalism be respected and that land-use policies be sheltered from the GATS. The GATS agreement clearly must be changed, rather than being expanded further. Specifically, the USTR should be asked by concerned state and local officials to:

- halt negotiations until there is a complete assessment and explicit agreement among trade officials regarding how current and past GATS commitments impact the regulatory authority of local governments
- withdraw U.S. GATS commitments impacting land use (including retail distribution, wholesale distribution, hotel and restaurant operations), or failing that, negotiate to exempt all zoning laws from U.S. GATS commitments with a horizontal (across the board) limitation
- reject new GATS "disciplines" on domestic regulation, including provisions giving WTO tribunals the right to judge whether domestic service regulations are "necessary"
- fully and formally consult local officials regarding the GATS or any other trade agreement rules that impact local laws or authority before negotiations begin and as they develop
- refrain from negotiating similar regulatory restrictions in bilateral or regional trade agreements such the proposed Andean Free Trade Agreement with Colombia, Ecuador and Peru.

These steps, if implemented, could forestall future damage. But, in the long term, policy-makers at all levels of government will increasingly be put at risk if they do not push for the establishment of a federal mechanism to ensure the prior informed consent of relevant state and local officials to trade agreement provisions that undermine existing state and local laws and infringe on state and local policymaking authority. International "trade" agreements being negotiated today extend far beyond traditional trade matters such as tariffs and quotas. These agreements include constraints on domestic policy and policymaking in areas as diverse as zoning and land use, health care, education, government procurement, environmental and safety policy, and access to affordable medicines. Domestic laws – including state and local policies – that go beyond the terms of these "trade" agreements are subject to challenge in closed trade tribunals in which state officials have no standing or right to participate. If a domestic law is found to violate trade rules, the law must be eliminated or permanent trade sanctions are put into place. While states find themselves bound to many aspects of these "trade" agreements, currently there is no mechanism in state or federal law to systematically notify state or local policy-makers when agreements containing terms affecting state and local authority are under negotiation, much less to obtain the consent of state elected officials before federal negotiators offer to permanently bind state laws. Such mechanisms must be developed and exercised as part of the larger effort that is needed to more fully ensure democratic and accountable governance in the era of globalization.

For more information on Public Citizen's Global Trade Watch's work on WTO, GATS, or other issues, please contact Sara Johnson (sjohnson@citizen.org) or Mary Bottari (mbottari@citizen.org).

APPENDIX ONE

LIST OF LAND-USE POLICIES THAT WTO GOVERNMENTS CARVED OUT OF THE GATS, RETAIL MODE 3 (RIGHT OF ESTABLISHMENT) EXCEPTIONS

County	Limitations on market access rules
Belgium	Economic needs test for department stores.
Bulgaria	Where establishment is subject to economic needs test, the main criteria are: the number and the impact on existing stores, population density, geographic spread, impact on traffic conditions. Licensing for specialized retail sales. Economic needs test for the establishment of department stores.
Bulgaria	Licensing for specialized wholesaling services. Economic needs test.
Canada	Fish Buyers (British Columbia): Mobile fish buyers licenses are not issued to foreigners.
China	Foreign service suppliers may supply services only in forms of joint ventures in five Special Economic Zones (Shenzhen, Zhuhai, Shantou, Xiamen and Hainan) and six cities (Beijing, Shanghai, Tianjin, Guangzhou, Dalian and Qingdao). In Beijing and Shanghai, a total of no more than four joint venture retailing enterprises are permitted respectively. In each of the other cities, no more than two joint venture retailing enterprises will be permitted. Two joint venture retailing enterprises among the four to be established in Beijing may set up their branches in the same city (i.e. Beijing). Upon China's accession to the WTO, Zhengzhou and Wuhan will be immediately open to joint venture retailing enterprises. Within two years after China's accession to the WTO, foreign majority control will be permitted in joint venture retailing enterprises and all provincial capitals, Chongqing and Ningbo will be open to joint venture retailing enterprises. Foreign service suppliers will be permitted to engage in the retailing of all products, except for the retailing of books, newspapers and magazines within one year after accession, the retailing of pharmaceutical products, pesticides, mulching films and processed oil within three years after accession and retailing of chemical fertilizers within five years after accession. None, within three years after accession, except for: retailing of chemical fertilizers, within five years after accession; and those chain stores which sell products of different types and brands from multiple suppliers with more than 30 outlets. For such chains stores with more than 30 outlets, foreign majority ownership will not be permitted if those chain stores distribute any of the following products: motor vehicles (for a period of five years after accession at which time the equity limitation will have been eliminated), and products listed above and in Annex 2a of the Protocol of China's WTO Accession. The foreign chain store operators will have the freedom of choice of any partner, legally established in China according to China's laws and regulations.
China	Within one year after China's accession to the WTO, foreign service suppliers may establish joint ventures to engage in the commission agents' business and wholesale business of all imported and domestically produced products, except those products that immediately follow. For these products, foreign service suppliers will be permitted to engage in the distribution of books, newspapers, magazines, pharmaceutical products, pesticides and mulching films within three years after China's accession, and to engage in the distribution of chemical fertilizers, processed oil and crude oil within five years

	after China's accession. Within two years after China's accession to the WTO, foreign majority ownership will be permitted and no geographic or quantitative restrictions will apply. None, within three years after accession, except for chemical fertilizers, processed oil and crude oil within five years after accession.
Denmark	Economic needs test for new department stores.
France	Economic needs test for larger department stores. State monopoly on tobacco.
France	Wholesale pharmacies are authorized according to the needs of the population and within established quotas. State monopoly on tobacco and matches.
Ireland	Unbound for retail of alcoholic beverages.
Italy	State monopoly on tobacco. Economic needs test on establishment of any new department store/outlet and authorization can be denied in order to protect areas of particular historic and artistic interest.
Jordan	Subject to 50% foreign equity limitation, except that service providers that are also registered as agents in Jordan are subject to the same limitations applicable to CPC
Korea	Following services are subject to the economic needs test: • wholesale markets with floor space of more than 3,000 sq. m. • large stores with floor space of more than 3,000 sq. m. • wholesale trade centers • wholesale trade of used cars • wholesale trade of gaseous fuels and related products • foreign trade services
Korea	For a joint venture or a 100% foreign ownership, not more than twenty (20) shops with floor space of less than 3,000 sq. m. per shop are allowed. From January 1, 1996, this restriction will be eliminated. For a branch, only one (1) shop with floor space of less than 700 sq. m. is allowed. From January 1, 1996, this restriction will be eliminated. Retailing services for used cars and gaseous fuels are subject to the economic needs test. Department stores and shopping centers are prohibited.
Liechtenstein	Restrictions on sales area.
Mexico	Foreign investment up to 100 per cent of the registered capital of enterprises. Trade-union and co-operative stores do not allow foreign investment.
Mongolia	Unbound in retailing services.
Nepal	Unbound except as indicated in the horizontal section. In addition, unbound except until such time that Nepal grants such rights to any WTO Member in any subsector, or until Nepal determines the types of foreign entities which may provide these services, or that Nepal authorizes such rights under its laws and regulations, the supply of these services; whichever is earlier. Only through incorporation in Nepal and with maximum foreign equity of 80 percent.
Poland	Licensing of establishment of companies in the area of wholesale trade in imported consumer goods.
Portugal	Economic needs test for large (i.e. more than 2000 sq. m.) department stores.
Senegal	Unbound in retailing services.
Spain	State monopoly on tobacco.
Sweden	Individual municipalities may apply economic needs test to temporary trade in clothing, shoes and foodstuffs that are not consumed at the point of sale.
Switzerland	Some cantons have restrictions on sales area.
USA	Unbound in wholesale trade of alcoholic beverages.

LIST OF LAND-USE POLICIES THAT WTO GOVERNMENTS CARVED OUT OF THE GATS, HOTEL AND RESTAURANT MODE 3 (RIGHT OF ESTABLISHMENT) EXCEPTIONS

Country	Limitations on market access rules
Antigua and Barbuda	Hotel Proprietors Act.
Bangladesh	Commercial presence requires that foreign service providers incorporate or establish the business locally in accordance with the relevant provisions of Bangladesh laws, rules and regulations. There is no fixed ratio of equity between local and foreign investors. Foreign equity to the extent of 100 per cent is allowed.
Botswana	The service should be supplied through commercial presence.
Bulgaria	The suppliers are to be established as companies incorporated in the Republic of Bulgaria with no foreign equity participation ceiling. Tourist service licence issued by the Committee on Tourism. The number of foreign managers is not to exceed the number of the managers who are Bulgarian citizens, in cases where the public (state and/or municipal) share in the equity capital of a Bulgarian company exceeds 50 per cent. The provision of tourist guides' services is to be effected through authorized foreign persons.
Cambodia	None for hotels 3 stars or higher. Permit is granted taking into account characteristics of the area #5.
Canada	Sale of liquor on premises (Nova Scotia): New licences require a majority approval in a public vote. Sale of liquor in a tavern, restaurant or bar (Québec): For juridical persons not listed on a Canadian stock exchange, all shareholders owning 10 per cent or more of voting shares must be Canadian citizens or permanent residents. (Saskatchewan): The majority of shareholders must be Canadian and manager must be a Canadian citizen or permanent resident. Sale of liquor (Québec): Is limited to federally incorporated companies.
Central African Republic	Unbound for tourism and travel related services.
Chad	No limitation, subject to the provisions of Articles 13 and 18 of the Investment Code and the approval requirements under regime A, B and D and Order No. 26/PR/85 of 7/10/85 establishing regulations for tourism establishments.
China	Foreign services suppliers may construct, renovate and operate hotel and restaurant establishments in China in the form of joint ventures with foreign majority ownership permitted.
Congo	Prior ministerial approval. The procedure is discretionary. The conditions to be fulfilled in order to obtain approval may constitute limitations that are incompatible with Article XVI.
Costa Rica	Unbound in hotels and other lodging services. In order to prove that it is a tourist enterprise, an enterprise must meet certain requirements, such as prove that earnings received or estimated from the sale of food amount to at least 50 per cent of total sales, not including the cost of admission charges, table reservations or other similar charges.
Dominica	Subject to alien landholding regulations, exchange control regulations. Limited to the development of hotels in excess of 50 rooms. Hotel development of less than 50 rooms may be subject to an economic needs test.
Egypt	A licence will be given according to the requirement of economic needs test (main

	criteria: market needs and locating different categories of hotels). Casino services can be provided only through 5 stars hotels (gambling allowed only for foreigners). Limitations on the total number of services operations depend on the requirement of economic needs test (geographical location, increase in the number and categories of tourists). Foreign capital equity should not exceed 49 per cent in projects to be established in Sinai.
Fiji	Normal government approval and registration required for all foreign investors. Limited to speciality restaurants and hotel restaurants, where speciality restaurants unavailable.
Gabon	Prior approval of the ministries concerned. The procedure is discretionary.
Greece	Authorization can be denied in order to protect areas of particular historic and artistic interest.
Grenada	Subject to alien landholding regulations, exchange control regulations. Limited to the developments of hotels in excess of (100) rooms. Hotel development of less than 100 rooms may be subject to an economic needs test.
Guinea-Bissau	Subject to approval by the Council of Ministers.
India	Only through incorporation with a foreign equity ceiling of 51 per cent
Indonesia	In eastern part of Indonesia, Kalimantan, Bengkulu, Jambi and Sulawesi, 100% of capital share can be owned by foreign investor.
Israel	Ownership must be in hands of Israeli-registered company.
Italy	Local economic needs test on opening of new bars, cafés and restaurants; authorization can be denied in order to protect areas of particular historic and artistic interest.
Jamaica	Registration, licensing required.
Jordan	Subject to 50% foreign equity limitation. Jordanian juridical entity is required for franchising. Foreign equity limitation does not apply to these services when operated in hotels or motels. Exclusivity is currently granted to the national carrier. However, once exclusivity is lifted, access will be subject to 50% limitation on foreign equity and to any other limitations on legal form provided for by the Jordanian law. Number of service providers may be restricted.
Liechtenstein	Licence only granted if need for restaurants exists (assessment of economic needs is based on criteria such as population, degree of built-up area, type of neighbourhood, touristical interests, number of existing restaurants).
Lesotho	Unbound except as indicated in the horizontal section.
Lithuania	Limitations on access to establish a commercial presence in environmental protected zones.
Malaysia	Entry for service activities under CPC 641, 642, 643 is permitted only through a locally incorporated joint-venture corporation with Malaysian individuals or Malaysian-controlled corporations or both and aggregate foreign shareholding in the joint-venture corporation shall not exceed 30 per cent; or Entry for service activity under CPC 87909 is permitted only for the purposes of services contract awarded in Malaysia and implemented through a branch.
Mauritius	Foreign participation in hotels with less than 100 rooms limited to 49 per cent. In hotels with more than 100 rooms full foreign participation is allowed: none.

	The project must not be less than RS 10 million.
Mexico	Foreign investment up to 100 per cent of the registered capital of enterprises. It is necessary to hold a licence issued by the Ministry of Tourism (SECTUR) and a permit to engage in the activity from the competent authority (federal, State or municipal).
Nepal	None, except only through incorporation in Nepal and with maximum foreign equity capital of 51 per cent for travel agency and tour operator (CPC 7471) and 80 per cent for hotel, lodging services (CPC 6411) (star hotels only), and graded restaurants (CPC 6421-6423).
Niger	Prior approval of ministries concerned. The procedure is discretionary.
Oman	Foreign equity for restaurants limited to 49%.
Peru	Supreme Decree No. 006-73-IC/DS lays down the requirements which must be fulfilled in relation to classification of lodging establishments in Peru, concerning their placement in categories 5, 4, 3, 2 and 1 stars for lodging establishments. Likewise, any supplier of services who intends to operate a lodging establishment must request an operating licence from the Directorate General of Tourism, together with the licence to which the Police Special Licences Regulations refer. Only five or four-star lodging establishments may establish gaming casinos on their premises. Supreme Decree No. 021-93-ITINCI of 15 September 1993 regulates restaurant services in Peru, including their classification as establishments in the first category (5 and 4 forks), second category (3 and 2 forks) and third category (1 fork). Gaming casinos may only be established in 5-fork tourist restaurants and in buildings declared to be historic monuments following authorization of the National Institute of Culture. Likewise, any supplier of services who intends to operate a lodging and/or restaurant establishment must apply for enrolment in the Unified Register to which Supreme Decree No. 118-90-PDM refers.
Philippines	No foreign equity is allowed if the specialty restaurant is not part of the facilities of a hotel.
Poland	Authorization can be denied in order to protect areas of particular historic and artistic interest.
Portugal	Authorization can be denied in order to protect areas of particular historic and artistic interest.
Saint Kitts & Nevis	Limited to development in excess of 50 rooms. Ownership of non-ethnic restaurants reserved for nationals.
Saint Lucia	Hotel and Resort Development and Operation in excess of 100 rooms.
Saint Vincent & The Grenadines	Subject to Commercial Code, Exchange Controls Act, Hotels Proprietor Act.
Senegal	Licence required.
Slovenia	None other than location in the protected areas of particular historic and artistic interest and within national or landscape parks is subject to authorization which can be denied.
Spain	Authorization can be denied in order to protect areas of particular historic and artistic interest.

Switzerland	Federal law enables cantons to grant licence for restaurants based on economic needs (assessment of economic needs is based on criteria such as population, degree of built-up area, type of neighbourhood, touristical interests, number of existing restaurants).
Tanzania	Acquisitions of domestic firms and mergers by foreigners are subject to approval. The acquisition of land by foreigners or domestic companies which are deemed foreign because of foreign equity ownership is subject to approval.
Togo	No limitation, subject to the laws and regulations in force concerning acquisition of real estate by foreign natural or legal persons (Law No. 60-26 of 5 August 1960 and implementing Decree thereto).
Uganda	Government approval is required in accordance with the Investment Code and the regulations within it.

*Source: WTO database on GATS commitments (*http://tsdb.wto.org/wto/WTOHomepublic.htm*), accessed December 2005.*

APPENDIX TWO

18 October 2002
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Working Party on Domestic Regulation

EXAMPLES OF MEASURES TO ADDRESSED BY DISCIPLINES UNDER GATS ARTICLE VI:4

Informal Note by the Secretariat

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ANNEX I - EXAMPLES CONTRIBUTED BY MEMBERS

A These examples appear to meet the requirements set by Members, i.e. specific measures not already found in the accountancy disciplines, which are also not XVI/XVII measures:

Transparency

- Lack of opportunity for interested nongovernmental market participants to meet with government officials to discuss the impact of new or proposed regulations.
- Inadequate information available, or information not readily available, to nongovernmental market participants about new or proposed regulations affecting their interests.

Licensing requirements

- [Subject to Members' interpretation.] Restrictive regulations relating to zoning and operating hours, to protect small stores.
- Federal and sub-federal licensing and qualification requirements and procedures are different, making a license or qualification recognition obtained in one state not valid in other states.
- Too many licenses required in order to operate a business.
- Overly burdensome licensing requirements (e.g. minimum age required for a physiotherapist 25 years old).
- Branches of a foreign company are required to regularly submit plan of activities to the government authority in order to be eligible to renew registration.
- Lengthy censorship procedures; too many censoring agencies with different criteria.

Licensing procedures

- It is necessary to obtain/renew the same license in every regional government.
- All the important papers necessary to establish business operation have to be certified by the Public Notary which can take a long time to process with no other alternative available.
- The effective period of licensing is very short.
- Authorization may not be handled through a single point.
- Inability of applicants to file complaints regarding review of their applications.

Qualification requirements

- Only persons who have specific certification from a government agency can take up managerial posts (e.g. managers of an insurance company must have certification from the insurance agency in that country).
- Requirement for fluency in language of the host country which in some cases not relevant to ensure the quality of service.
- Different sub-federal regulations for recognition of qualifications.
- Minimum requirements for local hiring (accountancy).
- Qualification procedures
- A large number of documents is required (application procedures).
- Need for in-country experience before sitting examinations (accountancy).

Technical Standards

- Unreasonable environmental and safety standards (maritime transport).

B. The following measures also appear to meet the requirements set by Members - provided they apply to sectors other than accountancy (otherwise they are already covered by the accountancy disciplines):

Transparency

- Regulatory changes without adequate prior notice, making the applicants not eligible to apply or have to find new supporting documents within a short period of time.
- Non-transparent regulatory environment (architecture, postal and courier, audiovisual, distribution, education, energy, environmental, sporting, and tourism services).
- Domestic laws and regulations are unclear and administered in an unfair manner; subsidies for higher and adult education, and training are not made known in a clear and transparent manner.
- A lack of transparency in domestic town planning regulations, that might prejudice decisions on the location of installations to provide such services through commercial presence (distribution services).
- Long delays when government approval is required, and, if approval is denied, no reasons or information given on what must be done to obtain approval in the future (postal and courier services).

Licensing requirements

- Absence of pre-determined, clear criteria for licensing requirements (including postal and courier, and distribution services).
- Unreasonable restrictions on licensing (legal services)
- Restrictive licensing practices (tourism).
- Unclear licensing and approval requirements (energy services).
- Unspecified approval and licensing requirements (environmental, financial, and tourism services).
- Irrelevant requirements to obtain license (e.g. jewellery artists must obtain a permit or license from the National Bank).
- Too many steps for business registration and such registration must be renewed relatively frequently (e.g. every 2 years) at considerable time and expense.
- Non-transparent registration procedures; unpredictable timeframe for registering process.

- Restrictions on registration (e.g. residency requirements), which prevents foreign engineers from signing off on drawings and managing projects.
- Unduly burdensome requirements.
- Onerous licensing requirements (consulting, engineering, construction, and distribution services).
- As licenses can be difficult or impossible to obtain, forwarders often have to resort to intermediaries or form partnerships (Other transport services).
- Registration is required both at the central and local governments (or local commercial courts); the procedures at the local level are often not transparent and taking a long time without adequate explanation for the delay.
- Residency requirements. (including computer, telecommunications, audiovisual, construction, distribution, energy, financial, sporting, and tourism services).
- Residency requirements for advertising production professionals filming in some countries and/or for employees of the advertising firm.
- Mandatory membership of a Chamber of Commerce or a local association required as a pre-condition to operate business in local areas.
- To be licensed as a professional, there is a requirement or pre-requirement to be a member of an affiliate organization. This organization has no regulatory authority over the profession (i.e. union, country club). To be a member of this organization, the licensee must be a resident of the territory or have lived in the territory for the past six months.
- Requirement to have numerous different legal entities as a pre-condition to apply for a business operation license.
- Applicant must possess indemnity insurance or be bonded prior to licensing.
- Licensing fees that are considered as expensive by international standards.
- Registration/approval is required in order to provide services.
- Authorization requirements are cumbersome: e.g. a permit is required for every single project.

Licensing procedures

- Work history and letters of reference from all previous employers unrelated to the authorization sought.
- Documented proof of physical and mental well-being.
- Overly complicated licensing procedures (e.g. have to go through many steps in many agencies in order to obtain a license).
- Excessive, vexatious formalities, lacking in transparency, for professional licensing purposes, etc.
- Only original documents will be accepted.
- Only documents translated or authenticated by that country's Embassy in Bangkok will be accepted, causing unnecessary delays and expenses (especially if additional documents for an application are required at short notice).
- Delays in receiving an application.
- Delays in informing the applicant of the decision (unreasonable time).
- Where government approval is required but denied, no reasons are given for denial, and no information is given on what must be done to gain approval in the future.
- No possibility for the applicant of correcting minor errors in its application form.
- No possibility of resubmitting applications for licensing after a first rejection.
- Delays in implementing the terms of the licence
- Lack of transparency
- The period of time required for the processing of a license application is not very clear.
- The processing period for a license application is long.

- A great deal of documents must be submitted through several stages in order to obtain authorization.
- Excessive application and process fees (including postal and courier, distribution, and educational services).
- Authorization procedures are costly.
- Authorization procedures take up a considerable amount of time.

Qualification requirements

- Residency requirements.
- The scope of examinations of qualification requirements goes beyond subjects relevant to the activities for which authorization is sought.
- Requirements needed for eligibility to take exams are more burdensome than necessary and not relevant to ensure the quality of service (e.g. must stay in that country at least 3 years to be eligible to take exam).
- Qualification requirements other than education, examinations, practical training, experience and language skills.
- Examinations that do not appear to be directly related to the concerned qualifications are required.

Qualification procedures

- Long delays in the verification of an applicant's qualifications acquired in the territory of another Member.
- Lack of a legal framework for accepting professionals with foreign qualifications, or lack of internal consistencies of such a framework.
- Non-recognition of foreign qualifications (including engineering, construction, financial and sporting services).
- Limited or no recognition of foreign qualifications (architecture, legal services).
- Non-recognition of qualifications obtained in country of origin (e.. not accepting cooking certificate from a government institute) and refusal to consider past working experiences and/or apprenticeship in country of origin.
- Common exclusion of developing countries from mutual recognition agreements.
- Unreasonable intervals for examination of applications .
- Limited openness or process (all eligible applicants do not benefit from the same level of openness).
- Unreasonable period of time for the submission of applications.
- Excessive administrative costs that do not reflect fees charged.
- Residency requirements for sitting examinations (not subject to Article XVII).

ANNEX II – EXAMPLES FROM WPPS MATERIALS

A. These examples appear to meet the requirements set by Members, i.e. specific measures not already found in the accountancy disciplines, which are also not XVI/XVII measures:

Licensing requirements

- Minimum capital requirements

Licensing procedure

- Applications to more than one licensing authority in any given jurisdiction for a particular service are required.

Technical standards

- [Subject to Members interpretation.] Restrictions on fee-setting, and restrictions/prohibitions on marketing and advertising.
- National standards which diverge from international standards.

B. The following measures also appear to meet the requirements set by Members -- provided they apply to sectors other than accountancy (otherwise they are already covered by the accountancy disciplines):

Licensing requirements

- Restrictions on the use of firm names.
- Residency requirements

Qualification requirements

- Requirements which do not take account of foreign qualifications.
- Local training requirements exceeding 12 months.

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